A

PP v. ARUMUGAM DORASAMY

HIGH COURT MALAYA, GEORGETOWN
MOHD RADZI ABDUL HAMID JC
[CRIMINAL APPLICATION NO: PA-44-17-06-2021]
1 SEPTEMBER 2021

B

Abstract – *A member of the public may express a factual or bona fide publication regarding a criminal trial but must never engage in any wild speculation, accusation or insinuation thereof, or embark on a public crusade to cast unwarranted aspersions and malicious conduct on the police, the prosecution and its witness, especially so when the trial was still on-going and when the full narrative of the prosecution's case was still in progress and unfolding. Venturing into such a strive is not only patently sub-judice and prejudicial to the fair hearing of the case, but may attract the issuance of a pre-emptive gag order by the court.*

C

D

CRIMINAL PROCEDURE: *Trial – Comments on – Gag order – Adverse comments on Facebook account on course of on-going trial – Whether occasioned by ulterior motive – Whether prejudicial to prosecution – Whether impairing administration of justice – Pre-emptive gag order – Whether to be issued*

E

The respondent had posted some comments on his Facebook account on the conduct of the police, the prosecution and the prosecution witnesses in an on-going murder trial, alleging, *inter alia*, that the doctor who conducted the autopsy on the victim ('SP2') was not telling the truth, that the safety of a potential witness ('Previin') was at stake, that there was manipulation of the evidence by the prosecution and its witnesses, and that there was an attempt by some quarters to cover up the case ('publication'). The prosecution contended that the comments, adverse and perverse as they seemed, had tarnished its integrity in prosecuting the trial, and more, had vitiated and impaired the administration of justice, and in the circumstances applied for a broad pre-emptive gag order against the respondent. The respondent argued that a gag order would offend his constitutional right to freedom of expression and urged the court to dismiss the same. It was further argued that the application ought indeed to have been dismissed *in limine*, as the affidavit in support thereof, having been deposed by a police officer deponent instead of a Deputy Public Prosecutor, was fatally flawed and inadmissible in evidence. Before the learned Judicial Commissioner, the primary issues that arose were: (i) whether the application was so incapacitated by the inadmissibility of the affidavit in support that it ought to be dismissed *in limine*; (ii) whether the publication was made in good faith or out of malice and improper motives and had impaired the administration of justice; and (iii) whether a gag order would be proportionate to the competing interests of the parties.

F

G

H

I

Held (granting gag order):

(1) The material matters that the respondent alleged against the police and the Public Prosecutor, which later became the subject matter of the publication, arose initially from events involving the deponent and his department and were within his personal knowledge; the deponent was therefore a proper person to affirm the affidavit in support. (para 8)

(2) To succeed in its application, the prosecution must show, firstly, that there was an immediate risk or threat of prejudice to the fair trial of the case and the administration of justice; secondly, that there was absent an alternative remedy that could be granted by the court to it; and thirdly, that the order, if granted, would be proportionate to the competing interests of the right to free speech and expression on the one hand and to a fair trial on the other. (paras 16-18)

(3) The publication was riddled with speculations, accusations and insinuations of some conspiracy to subvert the administration of justice through manipulation of evidence by witnesses, willful incomplete investigation, cover up of persons guilty for the death of the victim and abandonment of duties by the police and the prosecution. The respondent had, in short, embarked on a public crusade to cast aspersions and malicious conduct on the prosecution and its witnesses when the trial was still on-going and when the full narrative of the prosecution's case was still in progress and unfolding. This, the respondent had no license to launch or venture into; it was also patently *sub judice*. (paras 33-37)

(4) It is not too unlikely that a prospective witness who had notice of the scathing remarks made by the respondent against SP2 would become a reluctant or uncooperative witness thereby posing difficulties to the prosecution in eliciting material evidence. The publication, indeed, had already had an impact on Previin, who inexplicably failed to appear in court as a prosecution witness despite multiple attempts to reach him. There is thus a real threat and risk to a fair trial and the administration of justice in the on-going trial. There was also the further risk that other witnesses, fearing a backlash by members of the public, may colour the evidence to the prejudice of the prosecution or the accused. (paras 38, 40 & 41)

(5) The message as posted by the respondent post the application herein suggested that the application for the gag order was a sinister effort by the prosecution to shut the respondent out and to protect some persons involved in the murder. The message clearly implied that if this court were to grant that order, this court would then be equally complicit in the sinister plot. Notwithstanding the respondent's apology for the posting, the damage to the integrity of the court has been done. (para 48)

(6) The risk that the prosecution will face in the conduct of the trial *vis-a-vis* the conduct of its witnesses and the aspersions of malicious conduct alleged by the respondent could not be compensated by any other remedy. An order to gag the respondent was therefore appropriate and proportionate to the preservation of the right of the prosecution to conduct the trial without fear, undue pressure of public condemnation, suspicion of malicious conduct or the risk of any of its witnesses becoming an absent, uncooperative or fearful witness. (paras 50 & 53)

(7) This court will nonetheless not impose a broad gag order as proposed by the prosecution, as such an order would encroach on the constitutional right of the respondent to express any factual and *bona fide* publication he wishes to make regarding the trial. The gag order imposed will instead only restrict the respondent with regards to the publications or comments that have the effect of casting allegations of speculation, suspicion or illegal conduct, or a cover up or manipulation of evidence, either by the police, the prosecution and the prosecution witnesses, pending the final conclusion of the trial. (paras 55-57)

Case(s) referred to:
Ambard v. Attorney General for Trinidad and Tobago [1936] AC 322 ***(refd)***
Boucher v. The Queen (1954) 110 Can CC ***(refd)***
Bunya Jalong v. PP [2015] 5 CLJ 893 CA ***(refd)***
Dagenis v. Canadian Broadcasting Corporation [1994] 3 SCR 835 ***(refd)***
Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 4 CLJ 705 FC ***(refd)***
Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 4 CLJ 723 CA ***(refd)***
Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 4 CLJ 799 HC ***(refd)***
Foo Tseh Wan v. Toyota Tsusho (M) Sdn Bhd & Anor [2018] 4 CLJ 653 HC ***(refd)***
Iris Koto (M) Sdn Bhd v. Chong Sam Mooi & Anor [2019] 1 LNS 914 HC ***(refd)***
Johnson Tan Han Seng v. PP & Other Appeals [1977] 1 LNS 38 FC ***(refd)***
Krishnan Ramar v. PP [1987] 1 CLJ 28; [1987] CLJ (Rep) 145 SC ***(refd)***
Loot Ting Yee v. Tan Sri Sheikh Hussain Sheikh Mohamed & Ors [1982] CLJ 66A; [1982] CLJ (Rep) 203 FC ***(refd)***
PCP Construction Sdn Bhd v. Leap Modulation Sdn Bhd; Asian International Arbitration Centre (Interverver) [2019] 6 CLJ 1 FC ***(refd)***
PP v. Choo Chuan Wang [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329 HC ***(refd)***
PP v. Datuk Harun Hj Idris & Ors [1976] 1 LNS 180 HC ***(refd)***
PP v. Lee Eng Kooi [1993] 2 CLJ 534 HC ***(refd)***
Rosli Yusof v. PP [2021] 7 CLJ 681 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 13
Federal Constitution, arts. 5(1), 10, 126
Penal Code, s. 302

Other source(s) referred to:
Bennet L Gersham, *The Prosecutor's Duty of Silence*, 79 Alb L Rev 1183

For the applicant - Khairul Anuar Abdul Halim, Mohd Amril Johari, Noor Azura Zulkifle & Yazid Mustaqim Roslan; DPPs
For the respondent - Arun Ganesh Boopalan, Rajesh Nagarajan & Sachpreetraj Singh Sohanpal; M/s Raj & Sach

Reported by Wan Sharif Ahmad

JUDGMENT

Mohd Radzi Abdul Hamid JC:

Introduction

[1] This is a decision and grounds of judgment regarding an application by the prosecution against the respondent for a pre-emptive gag order ("application"). The application and the affidavit supporting the application by ASP Nor Hisham bin Haji Ramli ("affidavit-in-support") appear in encls. 1 and 2.

[2] The matters complained of in the application relates to certain publications made by the respondent posted on his Facebook account pertaining to the conduct of the police, prosecution and prosecution's witness in the course of the trial of case PA-45B-1-02-2018 ("publications").

[3] Case PA-45B-1-02-2018 is an on-going trial of four accused persons who are charged under s. 302 of the Penal Code for the murder of one Nhaveen a/l Thirumaran ("victim") ("trial"). Based on the prosecution's list of witnesses a total of 17 persons will give evidence in the course of the trial. As at the last hearing date on 5 May 2021, six witnesses have given their evidence including PW2 (Dr Amir Saad, pathologist) and PW5 (Madam Shanti a/p Dorairaj, mother to the victim) ("Madam Shanti").

Preliminary Objections

[4] At the outset of the hearing of this application, learned counsel for the respondent raised two preliminary objections which in their contention rendered the application legally incapacitated and therefore should be dismissed *ad limine*.

[5] The two preliminary objections are that (i) the deponent of the affidavit-in-support is not the correct and proper person to affirm the affidavit in support; and (ii) that the affidavit-in-support was not affirmed before a Commissioner of Oaths.

[6] With regards to the first point, learned counsel for the respondent submitted that since the applicant in the application is the Public Prosecutor then any one of the Deputy Public Prosecutor present in arguing for the application, in particular Amril bin Johari should have affirmed the affidavit-in-support and not ASP Nor Hisham bin Haji Ramli ("the deponent").

Learned counsel for the respondent referred to the case of *Foo Tseh Wan v. Toyota Tsusho (M) Sdn Bhd & Anor* [2018] 4 CLJ 653; [2018] 9 MLJ 664 where the High Court held upon revision that an application made by counsels watching brief in a criminal proceedings at the Sessions Court did not have the *locus standi* to make applications in a criminal trial since they were not a party to the criminal proceedings. Relying on that decision learned counsel for the respondent argued that the deponent had no role in the current application and thus had no *locus standi* to support the application.

[7] In counter-argument, learned Deputy Public Prosecutor submitted that the background facts as averred by the deponent in the affidavit-in-support that leads to the posting of the publications by the respondent were in his personal knowledge. They served as the valid basis for the filing of the application and therefore this court should not hold the deponent as not having the *locus standi* to affirm the affidavit-in-support to set the application into motion.

[8] After considering the contents of the affidavit-in-support and the publications, this court is satisfied that the deponent was a proper person to affirm the affidavit-in-support. The material matters alleged by the respondent against the police and the Public Prosecutor which later became the subject matter of the publications arose initially from events involving the deponent and his department which are within his knowledge. In this court's view, the decision in *Foo Tseh Wan* (*supra*) has no relevance to the consideration of the instant matter. In that case, the applicant was a person who was not a party to the criminal proceedings whilst in the present case the application is made by the Public Prosecutor and not the deponent himself. Therefore, the issue of *locus standi* should not arise. In any event, the application was then further supported by the affidavit-in-reply of Amril bin Johari (encl. 10).

[9] With regards to the second point, learned counsel for the respondent argued that whilst it was conceded that the Covid-19 movement control orders had made the affirmation of affidavits difficult and that para. 7 of the directions issued by the Chief Justice on 31 May 2021 (Arahan Ketua Hakim Negara, Bilangan 8, Tahun 2021) ("directions") had provided relaxation to the requirements regarding affirmation of affidavits in any application supported by a certificate of urgency, yet the applicant had failed to file an affirmed copy of the affidavit in compliance with para. 7 of the directions after the Ministry of International Trade and Industry had allowed the resumption of the services of Commissioners of Oath on 28 June 2021 and the counters for the taking of oaths at the courts of Georgetown, Penang had resumed on 1 July 2021. Since the application was filed on 18 June 2021 and until the hearing of the application on 28 July 2021 an affirmed copy of the affidavit-in-support has yet to be filed, there is therefore no affidavit filed before this court and as such there is no application to be heard by this

court. Relying on the authority of *Iris Koto (M) Sdn Bhd v. Chong Sam Mooi & Anor* [2019] 1 LNS 914; [2019] MLJU 619, it was submitted that an unaffirmed affidavit amounts to no affidavit at all. A

[10] In response to those arguments, Deputy Public Prosecutor had explained that they had in fact secured an affirmation of the affidavit-in-support but only on 27 July 2021. A copy of the affirmed affidavit-in-support was then extended to this court and the respondent. Deputy Public Prosecutor submitted that there was a delay in securing the affirmation of the affidavit-in-support as his department was having difficulties in securing the timely re-execution of the affidavit-in-support by the deponent who is a senior police officer. Notwithstanding the delay, it was contended that para. 9 of the directions effectively barred the respondent from raising any objection relating to the filing of unaffirmed affidavits. B C

[11] It would be relevant to reproduce paras. 7 and 9 of the directions:

> **B. Penyempurnaan Afidavit Bag/Kes Perakuan Segera Atau Permohonan Segera** D
>
> 7. Bagi apa-apa kes perakuan segera atau permohonan segera, pihak-pihak bolehlah memfailkan afidavit yang belum disempurnakan dengan aku janji untuk menyempurnakan afidavit tersebut dalam tempoh empat belas (14) hari selepas: E
>
> (a) tamatnya tempoh PKP; atau
>
> (b) apa-apa arahan yang dikeluarkan oleh Kerajaan yang membenarkan Perkhidmatan Kehakiman dan Perundangan untuk beroperasi dalam tempoh PKP.
>
> ... F
>
> **Sekatan Dalam Membuat Bantahan Terhadap Ketidakpatuhan Tatacara**
>
> 9. Bagi maksud pemakaian Arahan ini, pihak-pihak tidak boleh membangkitkan apa-apa bantahan mengenai ketidakpatuhan dari segi tatacara berhubung dengan: G
>
> (a) kehendak pematuhan tempoh masa; dan
>
> (b) kehendak penyempurnaan pemfailan afidavit.

[12] After considering both parties' arguments, this court accepts the explanation of the Deputy Public Prosecutor on the delay in getting the re-execution of the affidavit-in-support by the deponent and therefore exercises its discretion to allow the affirmed affidavit dated 27 July 2021 as the affidavit perfected in support of the application (encl. 17). It would have been a different situation if the applicant failed to produce an affirmed affidavit on the date of hearing, in which case this court would have agreed with the respondent that there was no affidavit to support the application. In addition, H I

A the case of *Iris Koto* (*supra*) was not subjected to the exceptional circumstances faced by litigants and the courts caused by the Covid-19 pandemic and movement control orders. The directions were issued to address some of the procedural issues faced by litigants and in this court's view a wide latitude of discretion should be exercised by the courts in favour of the affected
B parties. It is only when the failure to comply with the directions is blatant and unexplained should the discretion be exercised against the party seeking to rely on it.

Merits Of The Application

C **[13]** After hearing the able and well-presented arguments by learned Deputy Public Prosecutors for the applicant and learned counsel for the respondent and after considering all the affidavits supporting the application (encls. 2, 10, 11 and 17) and all those opposing the application (encls. 7, 8, 9, 12, 13 and 14), this court finds and decides as follows.

D *Law And Principles*

[14] In embarking on its evaluation of the merits of this application, this court is principally guided by the decisions of the High Court [2019] 4 CLJ 799; Court of Appeal [2019] 4 CLJ 723; and the Federal Court [2019] 4 CLJ 705 in the case of *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* where the laws
E and principles governing pre-emptive gag orders were extensively discussed and stated.

[15] There did not arise at hearing of this application the issue of whether this court has the jurisdiction to hear an application for a pre-emptive gag order. Nonetheless, for the sake of brevity, as held by the High Court and
F then affirmed by both the Court of Appeal and Federal Court in *Dato' Sri Mohd Najib Hj Abdul Razak* (*supra*) this court has the necessary jurisdiction premised on arts. 10 and 126 of the Federal Constitution and s. 13 of the Courts of Judicature Act 1964, to hear and grant such an application subject to the satisfaction of certain conditions.

G **[16]** Pertaining to the applicable law and principles in the consideration of an application for a gag order, as extensively discussed by the High Court and later affirmed by the Court of Appeal and Federal Court in *Dato' Sri Mohd Najib Hj Abdul Razak* (*supra*), the conditions that the applicant must satisfy before this court can grant this application are:

H

(i) whether there is an immediate risk or threat of prejudice to the fair trial of the accused and the administration of justice;

(ii) whether there is absence of alternative measure; and

(iii) the order that is sought after is proportionate in reference to the
I competing interests of free speech and risk of prejudice to a fair trial and the administration of justice.

[17] In considering all those conditions this court must also consider if there is a usurpation of the role of this court in adjudicating the trial and whether there is an adverse discussion, comment and accusation against the conduct of the trial by the prosecution and the credibility of witness's testimonies that is prejudicial to the administration of justice.

[18] In the deliberation of those conditions and questions, this court is reminded that whilst any condemnation and pre-judgment of the outcome of a trial should not be tolerated, the right to free speech that includes public discussions on matters of public interest must not be unjustifiably curtailed. A balance must be struck between the competing interests of a fair trial and the freedom of speech where emphasis must be given to the preservation of freedom of free speech and expression.

The Publications

[19] The matters complained of by the applicant and which are at the core of this application appear in exh. NHR3 of the affidavit-in-support (encl. 2). These publications were posted on the respondent's Facebook page and accessible to the public. The respondent does not dispute that those publications were made and the Facebook page belongs to him. From the nature of comments and dates on those publications, it is evident that they were made after the conclusion of the last trial date on 5 May 2021.

[20] The relevant publications are briefly referred as follows:

(i) page 1 of exh. NHR3 – a narrative accusing a doctor who conducted the autopsy on the victim of not telling the truth, manipulation of evidence and that there is a hidden hand interfering with the disclosure of evidence;

(ii) page 2 – a narrative that seeks to contradict or challenge evidence what was presented at the trial or will be presented at the trial;

(iii) page 4 – a narrative regarding a piece of evidence not considered by the police with a photo of the State Prosecution Office;

(iv) page 6 – a narrative of a cover up and that a material witness in the trial Previin a/l Tana Segaran ("Previin") is not safe;

(v) pages 11, 12, 13, 14 – narratives of an alleged cover up; and

(vi) page 25 – a narrative that it was in the better interest of Previin to be under the protection of the respondent than the police after certain deaths were allegedly made on him.

[21] This court observed that the publications made by the respondent had caused certain comments from the public. These comments were posted on the respondent's Facebook page and can be viewed by the public:

A (i) page 17 – insinuation of cover up by public servants that is the police;

(ii) page 18 – request for publication of suspects name followed by a reply by respondent saying "soon". This has the effect of making the public believing that there are other suspects and that these suspects are not charged with the offence;

B

(iii) page 19 – comments that there has been a wilful failure in the administration of justice; and

(iv) page 20 – "Why not share with us all who are these hidden hands?" This has the effect of encouraging members of the public to speculate on

C alleged conspirators or schemers.

Arguments By The Applicant

[22] The arguments supporting the application were laid out in the written submission presented by the applicant and were also orally presented to this

D court. These arguments can be briefly summarised as follows:

(i) that the publications by the respondent amounted to hijacking the prosecution's role in conducting the trial;

(ii) that the publications have resulted in Madam Shanti who had appeared as SP5 and Previin who will be called as the star witness for the

E Prosecution losing their confidence in the credibility of the prosecution (as reflected in their respective affidavits for the respondent). In particular, with regards to Previin the loss of confidence was evidenced by his wilful failure to attend the court hearing on 6 July 2021 when he was scheduled to give evidence for the prosecution;

F

(iii) that the prosecution is without remedy to bring any defamatory suit against the respondent as it is against public policy for the prosecution to bring such an action; and

(iv) that the gag order is proportionate to the right of prosecution to conduct

G the trial of from any accusations of misconduct and free from any interference on its witnesses.

Arguments By The Respondent

[23] The respondent presented the following arguments:

H (i) that the respondent is a social activist and influencer who acts in the capacity of spokesperson for the Nhaveen action and investigation league and family of the victim namely Madam Shanti and Previin who is the main witness for the prosecution;

(ii) that the respondent acted to bring to the awareness of the public certain

I alleged misconduct by the police, the prosecution and prosecution witness after the conclusion of the last hearing date of 5 May 2021. The publications by the respondent were motivated and driven by his and

Madam Shanti's frustration that the police had allegedly refused to entertain their request for the consideration of new evidence relevant to the trial and that his and Madam Shanti's attempt through their legal advisors (who are also the same law firm acting for the respondent in this proceedings) to meet the Deputy Public Prosecutor was also met with a negative response;

(iii) that the publications were made in the honest interest of advancing the cause of the family of the victim in ensuring that all those who were responsible for the death of the victim are brought to justice; and

(iv) that those publications and comments by the public on the respondent's Facebook page should not influence this court as the ultimate decider of the issues at the trial is the judge and that as described by the Federal Court in *Dato' Sri Mohd Najib Hj Abdul Razak* (*supra*) the judge being a trained person is not easily swayed by irrelevant information. To quote the Federal Court:

> [35] A judge is a legally-trained individual who decides the case on the merits based on the law as applied to the facts. In determining the outcome of a matter, he or she is a dispassionate arbiter who takes into account only relevant considerations. A judge cannot be compared to a layman juror. He or she is not easily swayed by irrelevant information. Also, if a trial judge commits an error of law of fact that decision is entitled to be impugned and subsequently corrected on appeal.

Deliberations By This Court

[24] It is evident from the reading of the affidavits for the respondent (encls. 7, 8, 9, 12, 13 and 14) that the respondent together with Madam Shanti and Previin had sought to meet the police and the prosecution for the following purposes:

(i) to share information on certain new evidence not considered by the police;

(ii) to raise certain issues regarding the investigation into the events and persons related to the death of the victim;

(iii) to express their concern over how the prosecution was conducted where in their belief certain crucial questions and evidence were not put forth to and elicited from SP2 and Madam Shanti (SP5); and

(iv) their perceived lack of effort by the prosecution to interview these witnesses in preparation for the trial.

[25] The respondent claimed that he, Madam Shanti and Previin were disappointed and dismayed by the alleged refusal of the police and the office of the Deputy Public Prosecutor to effectively entertain their requests for

meetings to discuss the above matters. A letter dated 14 June 2021 from the office of the State Legal Advisor's office, Penang addressed to the respondent's legal advisor's firm was attached as exh. AD2 in the respondent's affidavit (encl. 7). That letter was relied on by the respondent to prove the reluctance of the Deputy Public Prosecutor's Office to meet with the respondent and his legal advisors based upon reasons stated therein.

[26] Reading the affidavits for the applicant as found in encls. 10 and 11 in reply to the affidavits filed by the respondent, in particular the affidavit of Deputy Public Prosecutor Amril bin Johari in encl. 10 ("Amril"), it is equally evident that there are serious disputes on the facts as alleged by the respondent through his affidavit and the affidavits of Madam Shanti and Previin. Amril specifically denied that he had failed or refused to meet Madam Shanti in preparation for the trial and that he would have eventually met Previin for the same purpose.

[27] At the hearing of this application there were heated arguments presented by both learned counsels for the respondent and the Deputy Public Prosecutor on those issues, in particular on the alleged refusal of the prosecution to meet the respondent, Madam Shanti, Previn and their legal advisors.

[28] Be that as it may, whilst those events and disputed facts may have served to enlighten this court on what had transpired in the background between the respective parties and the motivation of the respondent towards making those publications, this court's attention however, must be primarily focused on the fact and the nature of the respondent's publications. Were the respondent's publications as described by the House of Lords in *Ambard v. Attorney General for Trinidad and Tobago* [1936] AC 322 fair comments and criticisms made in good faith or were they made out of improper motives, malice or an attempt to impair the administration of justice?

[29] As correctly pointed out by learned counsel for the respondent, a judge sitting alone should not be persuaded by public discussions outside the court room. His duty is to deliberate on all evidence and issues and make the necessary decisions at the end of the trial. Nonetheless, whilst this court is confident in its own ability to carry out that duty, this court must equally take into consideration the effect of such publications on the on-going trial, in particular the witnesses who have yet to give their evidence and the conduct of the trial by the prosecution.

[30] The administration of justice is not only about the judge. As held in the case of *PP v. Lee Eng Kooi* [1993] 2 CLJ 534; [1993] 2 MLJ 322, the link in the administration of justice includes the investigation officers, the prosecution, counsels and the judge. As much as the meaning of administration of justice includes the right of an accused to a fair trial, it must

also equally include the right of the prosecution to a fair and proper conduct of a trial. The prosecution has the right to conduct its trial free from any undue influence, malicious accusations and impairment of any kind whether on itself or its witnesses. It would be relevant for this court to quote from Suffian LP in the case of *Johnson Tan Han Seng v. PP & Other Appeals* [1977] 1 LNS 38; [1977] 2 MLJ 66 (and other cases) where His Lordship stated:

> In deciding that the Attorney-General is not constrained by article 8 when deciding whether or not to prosecute and if so on what charge, whether a lesser or a greater one, it must not be thought that he may act dishonestly. The public of whose interest he is the guardian has a right to expect him to act honestly, without fear of powerful national and local figures or of the consequences to him personally or politically, and without favouring his relatives and friends and supporters, his principal concern being to maintain the rule of law so that there will be no anarchy and to maintain standards in public life and the private sector; and if he did not do his duty honestly and properly the public would be able to show their disapproval not however in the courts but elsewhere and in the last resort by voting against the party of which he is a member. In England the Attorney-General's decision to withdraw the charge in the Campbell Case in 1924 resulted in a change of government, see chapters 10 and 11 of The Law Officers of the Crown by Professor JLJ Edwards.

[31] In *PP v. Datuk Harun Hj Idris & Ors* [1976] 1 LNS 180, Abdoolcader J (as he then was) had the opportunity to state the meaning of the 'conduct' of a trial by the prosecution:

> 'Conduct' in Article 145(3) cannot but refer to the conduct of prosecutions in court, as it indeed appears *ipsissimis verbis* in section 377 of the Code. And 'control and direction' in section 376(i) of the Code is in respect of all criminal prosecutions and proceedings, and not of criminal procedure or the jurisdiction of the courts.
>
> 'Conduct' of criminal prosecutions and proceedings in Article 145(3) cannot connote the regulation of criminal procedure or of the jurisdiction of the courts or the power or discretion to do so. Any contrary contention would in effect in my view be tantamount to the suggestion of the Public Prosecutor arrogating to himself the legislative powers vested in Parliament under Item 4 and in particular paragraph (b) thereof in List I (Federal List) in the Ninth Schedule to the Constitution, with perhaps also the not inconceptible resultant intrusion or at least a more than peripheral incursion into the sphere of Article 121(1) of the Constitution which provides that the judicial power of the Federation is vested in two High Courts and in such inferior courts as may be provided by federal law – namely, the Subordinate Courts Act, 1948 which specifies the subordinate courts and their respective civil and criminal jurisdiction.

A Pursuing its signification, 'to conduct' means 'to lead, guide, manage' (*In re Bhupalli Malliah* AIR 1959 And Pra 477; *Pride of Derby v. British Celanese Ltd* [1953] 1 Ch 149, 167 at p. 167 per Lord Evershed, MR). It conveys the idea of leading and guiding, that is to say, the person who conducts the prosecution determines all important questions of policy involved in the course of the trial and the attitude to be adopted by the prosecution towards material objections raised or demands made by the accused with respect to the evidence.

B

[32] Thus, by that definition, the prosecution has the right to structure and strategise the direction of its case as it sees fit and advantageous including the approach in eliciting evidence from its witnesses.

C

[33] Reverting back to the publications, it is this court's view that the publications complained of as appearing in exh. NHR3 show that they are riddled with speculation, accusation and insinuations of some conspiracy to subvert the administration of justice through manipulation of evidence by witness, wilful incomplete investigation, cover up of persons who are also guilty for the death of the victim and abandonment of the duties of a public officer whether it be the police or the prosecution.

D

[34] In this court's opinion even if the respondent had some basis of complaint against the police or the prosecution as averred in his affidavit-in-reply in encls. 7 and 12, it is not a licence for the respondent to embark on a public crusade of accusations of malicious conduct on the prosecution and its witness when the trial is still in progress. There are more material witnesses who have yet been called to give evidence. The prosecution's work is still in progress and the full narrative of the prosecution's case is still unfolding. Any comment and condemnation on the prosecution's conduct of the trial are therefore clearly premature and a pre-judgment.

E

F

[35] Furthermore, the publications were made before such complaints were finally exhausted and resolved by the police or by the Attorney General's Chambers. If at all the refusal by the prosecution to meet the respondent and his legal advisors were, in the opinion of the respondent unjustified and not in the interest of the conduct of the trial, the respondent was not without avenue to exhaust all efforts with the head of the prosecution of the Attorney General's Chambers, failing that, the Solicitor General and following that, the Attorney General. Although a letter dated 10 June 2021 was addressed to the head of prosecution of the Attorney General's Chambers copied to the Attorney General and Head of Prosecution of the Attorney General's Chambers for the State of Penang (attached as exh. SD2 in encl. 9, affidavit-in-reply of Shanti a/p Dorairaj), in this court's view it was incumbent upon the respondent to exhaust all those efforts through proper channels instead of choosing to go to the public with sensational accusations and subjecting the prosecution's office to threat of a hunger strike as appearing at p. 18 of exh. NHR3. Whilst those matters may serve to narrate the reasons for the

G

H

I

continued publications by the respondent, the respondent cannot embark on a crusade posting public comments that tantamount to tainting the image and credibility of the prosecution and its witness in an on-going trial. The motives for those publications, however *bona fides* they are to the respondent cannot serve as justification for any publication that threatens to interfere with the administration of justice. To put it simply, the end does not justify the means.

[36] As pointed out by this court to learned counsel for the respondent, this court must look at the effects of such postings on the on-going trial, in particular on the witnesses who are yet to provide their respective testimonies. Although as stated in the Federal Court decision of *Loot Ting Yee v. Tan Sri Sheikh Hussain Sheikh Mohamed & Ors* [1982] CLJ 66A; [1982] CLJ (Rep) 203; [1982] 1 MLJ 142 the trial is determined by a judge sitting alone and that potential witnesses would not be impaired in giving their evidence since their evidence will be evaluated by the judge, such observation in this court's view was made by the Federal Court based upon the facts presented there which are different from the facts in the present application. Similarly, although the Court of Appeal in *Dato' Sri Mohd Najib Hj Abdul Razak*'s case (*supra*) echoed the same sentiment in its decision, the application of such view must be dependent on the facts of each case, in *Dato' Sri Mohd Najib Hj Abdul Razak*'s case (*supra*) the application was made by the accused person against the media at large, whilst in the present application, the application is made by the prosecution against a specific member of the public whose publications have touched upon the integrity of the trial and the prosecution's witness in an on-going trial.

[37] In this court's view the respondent had assumed the role of prosecutor and judge in casting aspersions on the integrity of the witness and the conduct of the trial. There is an implicit speculation that the prosecution of the case has been compromised and that there is manipulation of evidence to favour some unknown person or persons. In this court's mind that amounts to an act that is *sub judice* to the on-going trial.

[38] It is not too unlikely to anticipate that any prospective witness having had noticed of the scathing remarks made by the respondent against the doctor who undertook the autopsy of the victim (SP2), could possibly become a reluctant or uncooperative or forgetful witnesses thereby posing difficulties to the prosecution in eliciting material evidence. There is therefore a risk that further witnesses may colour their evidence to the prejudice of the prosecution's case or the accused persons out of fear that they will be ostracised in public for something they have or may have failed to state in evidence. It must be pointed out that the SP2 is not the only medical officer listed as witness in the trial and therefore any issues ventilated by the respondent when the trial is not yet concluded is seriously premature and had unjustifiably casted suspicion and doubt on the conduct of the prosecution's case.

[39] It is also clear to this court that the complaints of the alleged conduct of the prosecution and the respondent's postings had an impact on the readiness of Previin to appear as a witness for the prosecution when he failed to appear in court on 6 July 2021 without any explanation despite multiple attempts by the prosecution to reach him.

Final Analysis And Conclusion

[40] In this court's final analysis and conclusion, this court agrees with the applicant that there is a real threat and risk to a fair trial and the administration of justice in the on-going trial.

[41] All the accused persons in the on-going trial are entitled to the benefit of the presumption innocence until proven guilty. Any unproven speculation of some cover up or misdeed by the police, prosecution and its witness will cast the aspersions that these parties are in cohorts with the accused persons and therefore these accused persons must in all probability be guilty. The determination of the guilt or innocence on an accused person can only be achieved in accordance with the requirements of law by a court of law and not the court of public opinion, speculation and pre-judgment. As held by the Supreme Court in *Krishnan Ramar v. PP* [1987] 1 CLJ 28; [1987] CLJ (Rep) 145; [1987] 1 MLJ 292:

> It is one of the most basic rules of justice that however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law. It cannot be questioned that the offence of trafficking is a very serious one, the gravity of which is reflected in the sentence, in this case the sentence of death. But it does not mean that a person accused of one of the most serious crimes known to our law is not entitled to equal protection before the law and one of those items of protection to which he is entitled is that his guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough.

[42] Any accused person is entitled to a fair trial as implied in art. 5(1) of the Federal Constitution. As held by Edgar Joseph Jr J (as he then was) in *PP v. Choo Chuan Wang* [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329:

> ... Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial Court established by law.

[43] This court does not find that the publications were made as an objective and factual reporting of the trial or a *bona fide* discussion on the on-going trial by a member of the public. Whilst media publicity or even critical and informed discussion of a case cannot automatically amount to serious

prejudice to the criminal proceedings, in this court's mind publications made with clear use of language intended to cast suspicion and accusation of conspiracy of illegal acts by witnesses and the prosecution in an on-going trial is plainly prejudicial to the criminal proceedings and the administration of justice.

[44] If the prosecution is prejudiced by its own witness then the prosecution is handicapped in performing its public duties in assisting the court to find the truth of a matter under trial. It would lead to the failure of the prosecution in discharging its duty to call credible witnesses to present the narrative of its case. In *Boucher v. The Queen* (1954) 110 Can CC, the Supreme Court of Canada held:

> It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

[45] Closer to home, the Federal Court decision in *Rosli Yusof v. PP* [2021] 7 CLJ 681; [2021] MLJU 1044 had stated as follows:

> [29] We begin with the discussion on the proper role of the prosecutor. The prosecutor in a criminal trial occupies a special position. His or her role is unlike the counsel for a party in a civil trial or counsel for the accused. Unlike other clients who have interest in securing a conviction at all costs, prosecutors are often called "minister of justice" and their role is to present the whole case to the court and assist the court in finding out where the truth lies. Due to their special role in criminal trials, the prosecutors are under several well-defined duties including: (i) duty of disclosure (see section 51A of the CPC), (ii) duty to call all credible and relevant witnesses, and (iii) duty to conduct the case fairly. (See *R v. Banks* [1916] 2 KB 621; *R v. Sugarman* [1985] 25 Cr App R 109; *Muhammad bin Kadar and another v. Public Prosecutor* [2011] 3 SLR 1205).
>
> [30] We would like to emphasise that, at all times, prosecutors are expected to present their case fairly, impartially and professionally and assist the court in arriving at the truth by producing all the relevant facts to the court as "Officer of the Court" (See *R v. Guerin* [1931] 23 Cr App R 39).
>
> [31] In *Dato' Seri Anwar bin Ibrahim v. PP* [2010] 4 AMR 292 (FC), this Court observed at (page 310):
>
> > The right to a fair trial is of course a universal principle. It is inviolable.

A The same case quoted with approval a passage from the judgment of Mohd Zawawi Salleh JC (now FCJ) in *PP v. Mohd Fazil Awaludin* [2009] 2 CLJ 862; [2009] 7 MLJ 741, which reads:

> The principle of a fair trial is sacrosanct in all civilized legal jurisdictions. It is a principle of universal application. In Malaysia, the principle of fair trial and fairness have been long established and recognised in several decisions.

B

[46] In the case of *Bunya Jalong v. PP* [2015] 5 CLJ 893; [2015] 5 MLJ 72 the Court of Appeal had the opportunity to describe the role of the Public Prosecutor as such:

C

> [10] The role of the public prosecutor is quasi-judicial. It is to:
>
> (a) review the evidence in the investigation papers;
>
> (b) determine if the evidence in the investigation papers proves beyond reasonable doubt that an offence had been committed; and
>
> D (c) authorise the charges upon which the accused is to be charged and punished.
>
> [11] This quasi-judicial function is essential, because a decision to prosecute necessitates the accused to incur time and legal expense to defend himself, but for which there is no provision that he can recover
> E costs if he is acquitted. For this reason, and to ensure there can be no doubt the decision was to prosecute and not persecute, there is the responsibility for the public prosecutor to be satisfied that there is an offence according to law and that the investigation papers contain proof beyond reasonable doubt. The notion of 'if in doubt, prosecute and leave it to the court' is not only abandonment of that quasi-judicial function in
> F the exercise of the absolute discretion to prosecute but also exposes prosecution to falling conviction rates. If the public prosecutor itself is in doubt, what court could conceivably find an accused, defended by counsel, guilty?
>
> [12] Ensuring that an innocent man does not run risk of being victimised
> G or harassed by wrong exercise of powers of prosecution:
>
> (a) there must be charge for an offence known to the law; and
>
> (b) that the facts constituting the offence are proved to the standard of proof of 'proved beyond reasonable doubt'.

H **[47]** In addition, this court also finds that the conduct of the respondent on 28 July 2021 when this application was fixed for hearing before this court supports the applicant's case against the respondent.

[48] Before the hearing of this application commenced, this court's attention was brought to a social media WhatsApp posting made and
I circulated by the respondent in direct contradiction to the advice of respondent's learned counsel and learned counsel's undertaking made to this

court on 25 June 2021 that the respondent shall refrain from making any public statement pending the disposal of this application. When this was brought to the attention of learned counsel for the respondent, he confirmed after consulting with the respondent that the respondent did make such message. It is relevant to quote the relevant parts of that message:

> ***Press Meet: Nhaveen's Case: Gag Order Against Activist Arun Dorasamy – Greater Conspiracy***
>
> *The decision of the Penang DPP to apply for GAG ORDER against social media influencer activist and official victim's spokesman Arun Dorasamy proves greater conspiracy plan to conceal the truth in this Public Interest Case. Refusal of the DPP to meet the Nhaveen's family or Previin or their counsels throws a big question mark, who are they defending?* (emphasis added)

[49] The language of that message clearly suggests that the application is a sinister effort by the prosecution to shut the respondent in an effort to protect some other person or persons involved in the murder of the victim. In this court's view the message had the implication that if this court were to grant that order, then this court was equally complicit in that sinister plot. Notwithstanding that the respondent apologised to this court and this court accepted the apology, yet damage was done. The choice of words used, were deliberate and the accusation had gone public and along with it the possible negative impression that the public may have on the integrity of this court.

[50] Hence, it falls on this court's to jealously guard and preserve the public's confidence and respect in the concept of judicial power and the judges who exercise such power. As held by the Federal Court in *PCP Construction Sdn Bhd v. Leap Modulation Sdn Bhd; Asian International Arbitration Centre (Interverver)* [2019] 6 CLJ 1; [2019] 4 MLJ 747.

> [41] The courts of justice are the bulwark of a nation. Alexander Hamilton famously recognised, in the doctrine of the separation of powers, that the legislature controls money, the executive controls force and the Judiciary controls nothing. It is on public confidence that the Judiciary depends, for the general acceptance of its judicial decisions, by both citizens and the government. The public conforms to the decisions of the Judiciary, because they respect the concept of judicial power and the judges who exercise such power (see *Public Confidence in the Judiciary* by Murray Gleeson, Judicial Conference of Australia, Launceston, 2002).
>
> [42] Therefore the trust and confidence of the people in the judicial system to deliver impartial justice comprises the very foundation of the Judiciary.

[51] It is also plainly clear that the prosecution cannot enter the arena of public debate to comment on its conduct of the trial and its direction when the trial is on-going as any comments made especially in a criminal trial will have the risk of prejudicing all the accused persons who are presumed innocent until proven otherwise (see the article entitled "*The Prosecutor's Duty of Silence*" by Professor Bennet L Gersham, 79 Alb L Rev 1183).

[52] One of the considerations of the High Court in rejecting the application in *Dato' Sri Mohd Najib Hj Abdul Razak*'s case (*supra*) was that the applicant, his family members and counsel had provided interviews to the media and the court found that those interviews amounted to balanced reporting of rival views on the matter. However, such interviews and rival views are not available to the prosecution during the course of the trial which if given would amount to conducting its trial through public media. The prosecution can only respond to any allegation of misdeed by remaining steadfast and continuing to conduct its trial with honesty and integrity to the best of its ability. It is then left to the judge to decide at the end of the trial based on the evaluation of all evidence.

[53] For those reasons this court finds that there is an immediate risk or threat of prejudice to the fair trial of the accused persons and the administration of justice. The risks that the prosecution will face in the conduct of the trial *vis-a-vis* the conduct of its witnesses and aspersions of malicious conduct by the prosecution cannot be compensated by any other remedy. An order to gag the respondent is therefore proportionate to the preservation of the right of the prosecution to conduct the trial without fear, undue pressure of public condemnation, suspicion of malicious misconduct or the risk of any of its witnesses becoming an absent, uncooperative or fearful witness. On equal footing it is also proportionate to the right of all the accused persons to a fair trial and the presumption of innocence until proven guilty.

[54] In coming to that conclusion this court is guided by what was held by the Federal Court in *Dato' Sri Mohd Najib Hj Abdul Razak* (*supra*). Richard Malanjum CJ speaking for the court stated:

> [30] The overarching theme here is that as far as is possible, court proceedings should be open and accessible to the public in the interests of transparency. Statutory support for the open justice concept is embodied in s. 15(1) of the CJA which states that:
>
> > The place in which any Court is held for the purpose of trying any cause or matter, civil or criminal, shall be deemed an open and public court to which the public generally may have access:
> >
> > Provided that the Court shall have power to hear any cause or matter or any part thereof in camera if the Court is satisfied that it is expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reason so to do.
>
> [31] Open justice is fundamental to a functioning democracy and promotes good governance. Cognizant of this, the English Court of Appeal in *Hodgson and Others v. Imperial Tobacco Ltd* [1998] 2 All ER 673 remarked at p. 689 that:

> *The best way of avoiding ill-informed comments in the media in the case of this nature when the interest of the public is high, is for the court to be as open as is possible and practicable,* not only in relation to the trial but also in relation to the interlocutory proceedings which have to take place prior to that trial. *The other action which can be taken to reduce the risk of trial by media and the absence of co-operation between the parties affecting the conduct of the proceedings is to ensure that as soon as is practical a timetable is laid down for bringing the case to trial as early as possible* and giving any directions to the parties which are necessary in order to require them to co-operate in achieving this. The longer the trial is delayed the greater the opportunity for both sides to engage in tactical manoeuvres which have nothing to do with achieving a fair trial.

[32] Of course, no one is disputing here that open justice is not absolute. Under the common law, publication bans which are in substance similar to the relief being sought by the appellant are justifiable if there is a real and substantial risk of interference to the right to a fair trial. In *Dagenis v. Canadian Broadcasting Corporation* [1994] 3 SCR 835 the Canadian Supreme Court had occasion to examine the requirements to be fulfilled in a successful application for a publication ban:

> The party claiming under the common law rule that a publication ban is necessary to avoid a real and serious risk to the fairness of the trial bears the burden of justifying the limitation on freedom of expression. *He must prove that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure, that the proposed ban is as limited as possible, and that there is a proportionality between the salutary and deleterious effects of the ban.* The fact that the party seeking the ban may be attempting to safeguard a constitutional right must be borne in mind when determining whether the proportionality test has been satisfied. The judge should, where possible, review the publication ban at issue. He must consider all other options besides the ban and find that there is no reasonable and effective alternative available. He must also limit the ban as much as possible. Lastly, the judge must weigh the importance of the objectives of the particular ban and its probable effects against the importance of the particular expression that will be limited to ensure that the positive and negative effects of the ban are proportionate. (emphasis added)

[55] Guided also by the decision of the Supreme Court of Canada in *Dagenais* (*supra*) as quoted by the Federal Court above, this court does not propose to impose a broad gag order as sought by the applicant. Such an order would be more than necessary and encroaches upon the constitutional right of the respondent to express any factual and *bona fide* publication he wishes to make regarding the trial. A balance must be struck between the objective of the gag-order and the right of speech and expression of the

respondent. The ban or gag order will also not restrict the right of the respondent to continue communicating with the police or the prosecution on any *bona fide* matter.

[56] The gag order will essentially restrict the respondent with regards to publications or comments that have the effect of casting allegations of speculation, suspicion or accusations of illegal conduct, cover up and manipulation of evidence by the police, prosecution and the prosecution witnesses pending the final conclusion of the trial.

Decision

[57] The application is thereby allowed subject to and in accordance with the following order:

> Bahawa Responden dan/atau ejennya yang mempunyai kaitan secara langsung dan/atau tidak langsung dengan Responden diperintah dan ditegah sementara menunggu pelupusan muktamad perbicaraan kes PA-45B-1-02-2018 untuk tidak menerbitkan dan/atau menyebabkan penerbitan dalam media massa atau membuat siaran dan/atau apa jenis komunikasi dalam apa jua bentuk yang ditujukan kepada khalayak ramai dan/atau mana-mana pihak tertentu sebarang kata-kata, komen, perbincangan-perbincangan dan/atau kenyataan-kenyataan termasuk rujukan kepada sebarang komunikasi secara bertulis dan/atau tidak bertulis dengan pihak Pendakwaan dan/atau Polis DiRaja Malaysia yang mana kata-kata yang digunakan oleh Responden dan/atau ejennya secara langsung atau tidak langsung yang boleh membawa maksud atau kesan, sama ada disengajakan atau tidak dan/atau diniatkan atau tidak, bahawa perbicaraan kes PA-45B-1-02-2018 dicemari oleh salah laku atau kecuaian atau kegagalan yang disengajakan oleh pihak Polis, Pendakwaan, saksi-saksi perbicaraan dan terkait dengan itu timbulnya spekulasi, tuduhan, tohmahan atau syak wasangka bahawa akan atau sedang berlaku satu perbuatan khianat, niat jahat, komplot atau salah laku untuk tidak melakukan siasatan, pendakwaan, penyampaian keterangan saksi dan pengendalian perbicaraan kes PA-45B-1-02-2018 secara benar, telus dan saksama mengikut kehendak undang-undang dalam pentadbiran keadilan. Kegagalan mematuhi Perintah akan menjadi satu penghinaan terhadap Mahkamah yang mulia ini.